No. 20-303

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSE LUIS VAELLO-MADERO,
Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the First Circuit

BRIEF OF THE GOVERNMENT OF THE U.S. VIRGIN ISLANDS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

CONSTITUTIONAL PROVISIONS, TREATIES, & STATUTES

MISCELLANEOUS

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

INTEREST OF *AMICUS CURIAE* [1]

The U.S. Virgin Islands (USVI) is an "unincorporated" territory of the United States, acquired by purchase from Denmark in 1917. By law, its residents are birthright citizens of the United States. They live in the United States; they work in the United States; they fight and die in defense of the United States.

Despite this, Americans in the USVI are consigned to a degraded constitutional status. Like their fellow U.S. citizens residing in Puerto Rico, Virgin Islanders are routinely denied federal rights and benefits solely because of their residence in a U.S. Territory. The Supplemental Social Security (SSI) benefits at issue in this case are but one example of a century-long tradition of treating the Territories' U.S. citizens as a separate and disfavored class. That tradition, born of the infamous "*Insular Cases*," is rooted not in the Constitution but in explicitly racist and colonialist nineteenth-century ideology.

The USVI submits this brief amicus curiae to urge the Court to affirm the decision of the First Circuit, extend the full rights and privileges of citizenship to Americans residing in the Territories, and abjure the *Insular Cases* and their shameful legacy of second-class citizenship for a discrete group of loyal Americans based solely on where within the United States they live.

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[1] No counsel for a party authored this brief in whole or in part and no person other than Amicus or its counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties received notice of this brief and have provided their written consent.

INTRODUCTION AND SUMMARY OF ARGUMENT

Like their fellow U.S. citizens who live in Puerto Rico and the other U.S. territories, Virgin Islanders receive "separate and unequal" treatment under the law. Ever since the United States purchased the USVI from Denmark in 1917, the USVI and its residents have been relegated to second-class constitutional status—a legal problem with real-world consequences for more than 100,000 Virgin Islanders.

Unlike territories destined to become States, which have been "incorporated" into the constitutional fold (U.S. Dep't of the Interior, *Definitions of Insular Area Political Organizations* (June 12, 2015), https://www.doi.gov/oia/islands/politicatypes ("*Definitions*")), the USVI has been designated (first by the courts, and then by Congress) an "*un*incorporated territory." *See* 48 U.S.C. § 1541(a) (emphasis added); *Soto v. United States*, 273 F. 628, 633 (3d Cir. 1921).

This distinction, known as "the territorial incorporation doctrine," was drawn in the *Insular Cases*, a line of six core cases decided in 1901—during the Jim Crow era and at the height of the American imperialist period—and grounded in the racial and cultural prejudices of the time.[2] The *Insular Cases* raised questions of the structural relationship between the United States and its "unincorporated" territories and ultimately justified differential constitutional treatment for U.S. citizens who live in them.

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[2] *See Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901).

In part because of this infusion of geography into principles of citizenship, incorporation is no mere formality. Unless and until an unincorporated territory is "incorporated into a body politic," the Constitution does not apply to unincorporated territories "of its own force." *Dorr v. United States*, 195 U.S. 138, 149 (1904); *Soto*, 273 F. at 633–34 (citations omitted). Rather, "the guarantees of the constitution apply to unincorporated territories such as the Virgin Islands only when Congress has stated they are applicable or when fundamental rights are involved." *JDS Realty Corp. v. Gov't of the Virgin Islands*, 824 F.2d 256, 259 (3d Cir. 1987).

Which rights the courts consider "fundamental" for this purpose have been determined case by case—with no apparent pattern or discernible rule. This "patchwork" approach to constitutional rights leaves Virgin Islanders and residents of the other unincorporated territories (American Samoa, Guam, the Northern Mariana Islands, and Puerto Rico) with no certainty or predictability as to what their rights are, even though they are U.S. citizens.

In the USVI, this second-class status has translated into separate and unequal treatment in fact as well as law. Century-old economic struggles have been allowed to fester, even as the political power of the Territory's government to remediate these issues is limited and its citizens are denied equal access to federal benefits like SSI.

In this case, the Court can rectify the errors that the *Insular Cases*' incorporation doctrine introduced into the relationship between the United States and the unincorporated territories—and erase a shameful legacy of racial bias that continues to make life harder for their residents to this day. For the reasons that

follow, the Court should revisit the *Insular Cases*; overrule the per curiam decisions that rely on them, and which the Government uses to justify its discriminatory treatment of territorial residents; and affirm the decision below, establishing at long last the full and equal rights of American citizens, wherever in the United States they reside.

HISTORICAL AND FACTUAL BACKGROUND

The aphorism "[w]hat's past is prologue" applies with full force to the territories. WILLIAM SHAKESPEARE, THE TEMPEST act 2 sc. 1. Their present must be viewed in the context of their history, and "there is no getting away from the past." *Cf. Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1876 (2016) (Puerto Rico not a "separate sovereign[]" for double jeopardy purposes).

I. The Virgin Islands became a U.S. Territory at a time of anti-territorial hostility and economic struggle—which persists today.

At the end of the nineteenth century, the United States was in full expansionist mode. For nearly a century, American expansionism had been spurred on by the doctrine of "manifest destiny," "a mantra of Darwinian imperialism, containing elements of geopolitical theory, religious righteousness, and economic entrepreneurship aimed at justifying territorial aggrandizement and the conquering, subjugation, and absorption of 'inferior' people and races 'for their own good.'" Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 YALE L. & POL'Y REV. 57, 60 (2013); *see, e.g.*, John Fiske, *Manifest Destiny*, HARPER'S NEW MONTHLY MAG. 578, 588 (Mar. 1885) ("[T]he work which the English race began when it colonized North America is destined to go until every

land on the earth's surface that is not already the seat of an old civilization shall become English in its language, in its religion, in its political habits and traditions, and to a predominant extent in the blood of its people.").

In 1898, the United States won three Spanish colonies—Puerto Rico, the Philippines, and Guam—in the Spanish-American War. *See* Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.–Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754, T.S. No. 343 (Treaty of Paris). The Treaty of Paris, which put an end to the war, provided that "[t]he civil rights and political status of the native inhabitants of th[ose] territories . . . shall be determined by Congress." *Id.* But Congress did not immediately take up these complicated—and politically charged—questions.

Americans viewed the former Spanish colonies as "differe[nt] from the dominant stateside societal structure with respect to their race, language, customs, cultures, religions, and even legal systems." Torruella, *supra*, at 63. These differences gave rise to suspicion, especially after a violent uprising in the Philippines, and the presidential election of 1900 became a referendum on President William McKinley's expansionist ventures. *Id.* at 63–64. His reelection—along with new running mate Theodore Roosevelt, a "fervent promoter of imperial expansion" who lauded "'the expansion of the peoples of white, or European, blood' into the lands of 'mere savages'"—"effectively settled the political question." *Id.* at 64; Doug Mack, *The Strange Case of Puerto Rico*, SLATE (Oct. 9, 2017, 5:45 AM), https://slate.com/news-and-politics/2017/10/the-insular-cases-the-racist-supreme-court-decisio

ns-that-cemented-puerto-ricos-second-class-status.html ("Mack, *Strange Case*").

Because of the perceived racial and cultural differences between them, mainland Americans viewed residents of the new island territories as "others." This was the hostile climate that the USVI found itself in in 1917, when the United States purchased the Danish West Indies from Denmark in hopes of blocking Germany from annexing it and gaining a North American foothold during World War I. *See* DOUG MACK, THE NOT-QUITE STATES OF AMERICA 19–20 (2018).

Hostility was not the USVI's only problem. By 1917, the plantation system and triangular slave trade—"the backbones of its economy"—had ended, and a hurricane "all but wipe[d] out" the few remaining sugar plantations. DISABILITY RIGHTS CENTER OF THE VIRGIN ISLANDS, SHADOW CITIZENS: CONFRONTING FEDERAL DISCRIMINATION IN THE U.S. VIRGIN ISLANDS 10 (2021), https://drcvi.org/documents/general/DRCVI-ShadownCitizens.pdf?downloadable=1 ("SHADOW CITIZENS"). When Herbert Hoover became the first American president to visit the USVI in 1931, he derided it as "an effective poorhouse" and deemed it "unfortunate that we ever acquired these islands." MACK, *supra*, at 30.

This attitude set the tone for the federal government's treatment of the USVI: the Territory's economic struggles continue unabated, and the government has failed to provide assistance at levels that equal treatment would require, especially with respect to SSI.

For decades, the average USVI resident has been significantly poorer than her fellow citizens on the

mainland. In the mid-1970s, the per capita income level in the USVI was just 76% of that of the rest of the United States. DEP'T OF HEALTH, EDUC., & WELFARE, REPORT OF THE UNDER SECRETARY'S ADVISORY GROUP ON PUERTO RICO, GUAM, AND THE VIRGIN ISLANDS 2 (1976) ("UNDER SECRETARY'S RPT."). In 2016, the USVI's per capita income was $23,333—51% lower than the national average and 34% lower than the poorest state (Mississippi). SHADOW CITIZENS at 15.

Poverty has also persisted. The 1990 census showed 23.2% of residents living below the poverty line. U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS OF THE VIRGIN ISLANDS OF THE UNITED STATES 25 (1993), https://www2.census.gov/library/publications/decennial/1990/cp-2/cp-2-55.pdf. In 2010, 22% were still living in poverty. Grace Mayer, Borgen Project, *Poverty in the US Virgin Islands* (Aug. 6, 2020), https://borgenproject.org/poverty-in-u-s-virgin-islands/. By 2015, that number had risen to 25%. Eastern Caribbean Center, University of the Virgin Islands, *Virgin Islands Community Survey*, tbl. 1-16, https://datacenter.kidscount.org/data/tables/6704-individuals-in-poverty#detailed/4/any/false/573,869,36,868,867,133,38,35,18,17/1385/13776. The poverty rate remains more than twice that of the rest of the United States. JESSICA SEMEGA, ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2019 (2020), https://www.census.gov/library/publications/2020/demo/p60-270.html.

And with poverty comes diminished spending power. In 2009, the percentage of households living on less than $10,000 per year was nearly double that of the mainland United States. CONG. RSCH. SERV., R45235, ECONOMIC AND FISCAL CONDITIONS IN THE

U.S. VIRGIN ISLANDS 4 (2020 update). This data is particularly troubling in light of the USVI's high cost of living. While the average household income in the USVI is significantly lower than the poorest States, the cost of living exceeds the national average by 40 to 50%. SHADOW CITIZENS at 8.

II. The USVI is denied many forms of federal aid, and when it receives aid at all it generally receives less.

The USVI lags behind the rest of the United States in nearly every measurable aspect of economic growth and stability. But unlike the States, which regularly and (often) without question receive aid from the federal government, the USVI and the U.S. citizens who live there receive relatively little assistance. Federal benefits meant to help the poorest in American society, including SSI and Medicaid, are either denied to residents of the USVI or are available to them at substantially lower levels than similarly situated residents of the States. Even emergency funding is parceled out unequally to the Territories: in the Coronavirus Aid, Relief, and Economic Security Act, the four small Territories (population about 350,000) received about *one-fifth* the direct aid provided to the smallest State (population about 575,000). Pub. L. No. 116-136 § 601(c)(2)(A), (c)(6). The Territories are prohibited by statute from receiving equal benefits to citizens of the Fifty States, the District of Columbia, and the Northern Mariana Islands. *See* 42 U.S.C. § 1308. Instead of the myriad federal programs available to other citizens, the Territories are entitled only to a statutorily capped amount of aid. For the USVI, annual federal aid for the aged and disabled is capped at $3,554,000. *Id.* Unlike SSI, which operates as an entitlement, the number of

beneficiaries under this alternative scheme is limited by its annual funding. This cap—which is not indexed for inflation and has remained the same since 1997—in no way considers the actual needs of aged, blind, or disabled Virgin Islanders. WILLIAM R. MORTON, CONG. RSCH. SERV., CASH ASSISTANCE FOR THE AGED, BLIND, AND DISABLED IN PUERTO RICO 7 (2016). To make matters worse, nearly $2.9 million of that cap is taken up by the Islands' grant for the Temporary Assistance for Needy Families program, leaving only around $700,000 for payments to the needy elderly and disabled. SHADOW CITIZENS at 34.

The cost of administering these programs also strangles the Territory's economy. Under the current system, the burden of administering the aid programs falls on the Territory, rather than the federal government, and the law requires that the local governments fund 25% of all benefits, whereas the federal government funds 100% of SSI payments to the States. MORTON, *supra*, at 12.

Treating citizens living in the USVI (and the other territories) equally to their counterparts in the States would have a monumental impact on the lives of the Islands' most vulnerable. As the government has recognized for nearly half a century, extending SSI to citizens in the USVI would allow the elderly and disabled to enjoy a higher quality of life. UNDER SECRETARY'S RPT. at 5. In 2011, the average payment to benefit recipients in the Virgin Islands for all programs *combined* was just $176.07 per month, while the average monthly SSI payment for residents of States is around $600 per month. SHADOW CITIZENS at 34. So too with other federal programs designed to help the nation's most vulnerable citizens. The federal matching rate for the USVI's Medicaid expenditures has

historically been just 55%, a rate similar to that of some of the wealthiest States.[3] SHADOW CITIZENS at 14.

The USVI aspires to implement a sustainable and stable economy for the people of the Virgin Islands. Treating United States citizens living in the USVI as equal would stimulate normalization of the Territory's economy and begin to heal over a century of systemic inequality. But despite political promises to stabilize the USVI's economy and assist its poorest residents, "the United States has allowed alarming disparities to grow even more glaring and blatant over time." SHADOW CITIZENS at 1.

III. Territorial residents lack the political power to change their circumstances.

And yet the Virgin Islanders suffering this unequal treatment cannot hold lawmakers accountable because Congress has denied them the political power to do so.

Virgin Islanders were granted citizenship between 1927 and 1932 (*see* 8 U.S.C. § 1406), but, thanks to the *Insular Cases*' imposition of geographic constraints on citizenship, that did not solve the problem of unequal treatment. *See infra* Part I.A. Nor did the "partial self-governance" the USVI eventually acquired, first through a presidentially appointed local government; then a local legislature established by the Virgin Islands Organic Act of 1936 and strengthened by the Revised Organic Act of 1954; and most recently by permitting residents to elect their own governor. MACK at 30–31. Positive as these developments

[3] Although the Territory received a larger Medicaid allotment in 2017 because of Hurricanes Irma and Maria, that aid is scheduled to expire in September 2021. SHADOW CITIZENS at 21.

were, they all depended entirely on the beneficence of Congress. "Congress has unquestionably full power to govern [an unincorporated territory], and the people, except as Congress shall provide for, are not of right entitled to participate in political authority, until the Territory becomes a State." *Dorr*, 195 U.S. at 148.

Even as Congress controls the destiny of the territories and the U.S. citizens who reside there, those very citizens have no voting representation in it. SHADOW CITIZENS at 7. Nor do they have any electoral votes for President, or any Article III protections for their judges. *Id.* "The Virgin Islands' lack of a meaningful, equal voice in Washington D.C. means that federal law or policymaking that excludes U.S. territories is more likely to go unnoticed or unchallenged until it is too late." *Id.*; *see* Resp. Br. 28. It also has another, more insidious consequence: many Virgin Islanders have developed "a fundamental distrust of the American government to really, truly put them on equal footing, economically, politically, or otherwise." MACK at 42.

ARGUMENT

I. The *Insular Cases*—the foundation on which the Government's argument rests—entrenched the unequal treatment of Americans living in U.S. Territories.

The USVI's current economic struggles—and the limits on the federal and territorial governments' respective will and ability to remedy them—can be traced not only to the historical climate in which the USVI was brought into the American portfolio, but the legal framework that existed at the time. These outmoded and racially charged principles, encapsulated in the notorious *Insular Cases* (named after the

"generic term" for "[a] jurisdiction that is neither a part of one of the several States nor a Federal district," *Definitions*, *supra*) are still in force today—and play a key role in the Government's argument in this case.

A. The *Insular Cases* designated the Territories as quasi-"foreign" for constitutional purposes.

McKinley's reelection in 1900 might have settled the political question of territorial expansion, but it did not settle the *legal* question of "[t]he civil rights and political status of the native inhabitants." Treaty of Paris, art. IX. The ultimate issue—whether "the Constitution follows the flag"—was left for another day. *See* GOV'T PRINTING OFF., THE INSULAR CASES, COMPRISING THE RECORDS, BRIEFS, AND ARGUMENTS OF COUNSEL IN THE INSULAR CASES OF THE OCTOBER TERM, 1900, IN THE SUPREME COURT OF THE UNITED STATES, INCLUDING APPENDIXES THERETO 705 (1901).

That day arrived in 1900 after Congress passed the Foraker Act, establishing a civil government in Puerto Rico and funding it by taxing imports from the United States. Foraker Act § 4, Pub. L. No. 56-191, 31 Stat. 77, 81–82, 84. Whether a tax on imports from the United States to one of its *own* territories was constitutional depended on whether the territory was considered part of the "United States." The degree to which the territories and their residents were integrated into the United States for constitutional purposes was the central question of the *Insular Cases*.

The text of the Territorial Clause, which gave Congress the power to "make all needful Rules and Regulations respecting the Territory [there was only one, the Northwest Territory, at the time of the

founding] or other Property belonging to the United States," was of little guidance. U.S. CONST. art. IV, § 3, cl. 2; MACK at 10 & n.*. But the Court in 1900 was not writing on a blank slate.

Eighty years earlier, the Court held in *Loughborough v. Blake* that a federal tax that applied only to the District of Columbia was unconstitutional because the District was part of the "United States"—"the name given to our great republic, which is composed of States *and territories*," and "[t]he District of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania." 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.) (emphasis added). And in *Scott v. Sanford* (*Dred Scott*)—the most lamentable of any decision before or since but nonetheless valid precedent in 1901—the Court held that the Territorial Clause (or any other provision) did not authorize Congress "to establish or maintain colonies . . . to be ruled and governed at its own pleasure," "to acquire a Territory to be held and governed permanently in that character," or "to enlarge its territorial limits in any way, except by admission of new States." 60 U.S. (19 How.) 393, 446 (1856).

And yet, in the *Insular Cases*, the Court carved out an exception to this rule for the territories acquired after the Spanish-American War—that is, territories occupied by non-Anglo-Saxon peoples. Initially, the plurality of a splintered Court invalidated laws assessing tariffs on imports and exports to and from Puerto Rico and Hawaii (then a territory) on the ground that they were not "foreign countr[ies]." *See De Lima v. Bidwell*, 182 U.S. 1, 196 (1901); *accord Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Goetze v. United States*, 182 U.S. 221 (1901). But Justice McKenna,

who dissented from the start, ultimately won the day. He took the position that the Treaty of Paris had not automatically incorporated Puerto Rico into the United States. *De Lima*, 182 U.S. at 214 (McKenna, J., dissenting). Rather, Congress had to affirmatively incorporate new territories before they could become truly "domestic"—a necessary step, in order to avoid "the danger of nationalization of savage tribes." *Id.* at 219.

This "incorporation doctrine"—and the use of overtly racist language to justify it—became the law of the land when the Court shifted its focus from the Territories' status under the tariff laws to their legal status under the Constitution. In *Downes v. Bidwell,* the question was whether the Uniformity Clause, which requires "all Duties, Imposts and Excises [to] be uniform throughout the United States" (U.S. CONST. art. I, § 8, cl. 1), applied to Puerto Rico, thus precluding the provision of the Foraker Act that funded the territorial government with import duties on goods from the U.S. mainland. 182 U.S. 244, 247–48 (1901). Justice Brown, writing the lead opinion for a plurality of the deeply fractured Court, looked not to the text of the Constitution or to precedent—he brushed *Loughborough* and *Scott* aside as dicta—but to "a new method of disposing of th[e] case": examining "the nature of the government created by [the Constitution], in the opinion of its contemporaries, [and] in the practical construction put upon it by Congress." *Downes*, 182 U.S. at 249, 261–62, 274; Charles E. Littlefield, *The Insular Cases*, 15 HARV. L. REV. 169, 178 (1901). He concluded that the Foraker Act's duties on U.S. imports were constitutional because, while "Puerto Rico is a territory appurtenant and belonging to the United States," it is "not a part of the United

States within the revenue clauses of the Constitution." *Downes*, 182 U.S. at 287.

Like Justice McKenna, Justice Brown justified this geographical difference in constitutional treatment on explicitly racist grounds. To him, it was "obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people . . . which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians." *Id.* at 282. If territories are "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible," and "[a] false step at this time might be fatal to the development of . . . the American Empire." *Id.* at 286–87.

Concurring Justice White added that "incorporation [of a territory] does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family." *Id.* at 339 (White, J., concurring). Until then, Puerto Rico was "not a foreign country," but still "foreign to the United States in a domestic sense"—a puzzling observation that ran afoul of *Loughborough*, *Dred Scott*, and even the earlier *Insular Cases*. *Id.* at 341–42. Worse still, it tossed the new territories into constitutional "limbo." *Id.* at 372. (Fuller, C.J., dissenting).

A generation later, Chief Justice Taft—who had served as governor of the Philippines during the insurgency and, while President, claimed that Puerto Rico's local government had too much power "for their

own good"—"br[ought] his prejudices to bear" in *Balzac v. Porto Rico*, 258 U.S. 298 (1922), a significant post-*Insular Cases* decision addressing the rights of individuals living in the territories. Torruella, *supra*, at 76 (quoting President William Howard Taft, Message to Congress (May 10, 1909), *in* 3 THE COLLECTED WORKS OF WILLIAM HOWARD TAFT 96 (David Burton ed., 2002)).

In 1917, the Jones Act had granted Puerto Ricans citizenship. Pub. L. No. 64-368, 39 Stat. 951. A Puerto Rican facing a misdemeanor criminal charge claimed the right to a jury trial, relying on two earlier decisions in which the Court tied Hawaii's and Alaska's incorporation status—and, by extension, their citizens' entitlement to the same rights under the Constitution as citizens of States—to whether their residents had been granted citizenship. *See Rassmussen v. United States*, 197 U.S. 516, 522 (1905) (Alaska incorporated when treaty ceding it to the U.S. granted its residents "enjoyment of all the rights, advantages, and immunities of citizens of the United States"); *Hawaii v. Mankichi*, 190 U.S. 197, 210–11 (1903) (Hawaii incorporated in 1900, when residents were granted citizenship).

But the *Balzac* Court did not extend this logic to Puerto Rico. Instead, Chief Justice Taft reasoned that, as far as Puerto Rico was concerned, "[i]t [wa]s locality that [wa]s determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it." *Balzac*, 258 U.S. at 308–09. In an attempt to distinguish *Rassmussen* so transparently pretextual that it defies belief, he posited that Alaskans—also both territorial residents and U.S. citizens—were more suited than Puerto Ricans to a full complement of civil rights because

Alaska was "enormous," "sparsely settled," "offered opportunity for immigration and settlement by American citizens," and (most absurd of all) was "on the American Continent and within easy reach of the then United States."[4] *Id.* at 309.

The real reason for treating Puerto Ricans differently and worse soon emerged: whereas "[i]n common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume," it "is hard for people not brought up in fundamentally popular government at once to acquire" it. *Compare id.* at 310–11, *with* Torruella, *supra*, at 79 (Puerto Ricans had more popular participation in government under Spanish rule than in the government set up by the Foraker Act). Congress must therefore have "thought that a people like the Filipino or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin," and the Court could not "find any intention to depart from this policy in making Porto Ricans American citizens." *Compare Balzac*, 258 U.S. at 310–11, *with* Torruella, *supra*, at 79 (in fact, Puerto Rico had been conducting felony jury trials for more than 20 years). *See also Dorr*, 195 U.S. at 148 (Philippines). Chief Justice Taft opined that Puerto Ricans would still have "fundamental personal rights," but these apparently did not include the right to a jury trial, and what rights they *did* include would be left for another day. *Balzac*, 258 U.S. at 312; *accord*

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[4] According to Google Maps, Washington, D.C. is 1,556 miles from San Juan, Puerto Rico, and 3,714 miles from Juneau, Alaska.

Ocampo v. United States, 234 U.S. 91, 98 (1914) (Fifth Amendment's "requirement of a presentment or indictment by grand jury" did not apply in the Philippines, because "the Constitution does not, of its own force, apply to the Islands").

This is the legacy of the *Insular Cases* and their progeny: if a territory is not "incorporated" into the United States, the protections guaranteed to U.S. citizens by Constitution do not fully apply; only rights deemed "fundamental" do—and what those are, exactly, must be determined by the Court case by case. Torruella, *supra*, at 74. A century later, whether a vague reservation of ill-defined rights will, as a contemporary scholar put it, "quiet any apprehension as to the danger of placing the inhabitants of a territory at the complete mercy of Congress" remains to be seen. L.S. Rowe, *The Supreme Court and the Insular Cases*, 18 ANNALS OF AM. ACAD. OF POL. AND SOC. SCI. 38, 51 (1901).

B. The same racial bias from *Plessy* was integral to the *Insular Cases*' rationale.

Another takeaway from the *Insular Cases* are the "strong undercurrents of racial bias that permeated U.S. society at the turn of the century [and] undoubtedly influenced" the Court's decision-making process. Torruella, *supra*, at 58. The Court that decided the *Insular Cases* in 1901 was the same, "almost to a man," as the Court "that [had] decided the infamous 'separate but equal' case of *Plessy v. Ferguson*" just five years earlier. Torruella, *supra*, at 68 (citing 163 U.S. 537 (1896)). And the same "racism which caused the relegation of [Black Americans] to a status of inferiority was to be applied to the overseas possessions of the United States," whose residents were also classified as "second-class citizens[]." RUBIN FRANCIS WESTON,

RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946, 15 (1972). Viewed in this context, the language the Court used in the *Insular Cases* and their progeny is chilling, as when it:

- queried how the judiciary might distinguish between the "civilized and uncivilized" to determine "who [was] capable of self-government" and "who [was] not" (*De Lima*, 182 U.S. at 219);
- feared the "extremely serious" consequences of permitting the "children" of territorial "inhabitants," "whether savages or civilized," to enjoy "the rights, privileges and immunities of citizens" (*Downes*, 182 U.S. at 279);
- recalled "insurrections" in the Philippines in which "uncivilized tribes" dared to "def[y the] will" of Spain (*Fourteen Diamond Rings v. United States*, 183 U.S. 176, 180 (1901));
- extended the U.S.'s "prohibition of the immigration of the Chinese" to Hawaii upon its incorporation (*Mankichi*, 190 U.S. at 225); and
- explained with apparent approval that the President encouraged that Filipinos be denied the right to trial by jury because "the uncivilized parts of the archipelago were wholly unfitted to exercise" that right (*Dorr*, 195 U.S. at 145).

These are not unfortunate stylistic choices. The assumption that the residents of the island territories were not, because of their races and ethnicities, "capable of self-government" in accordance with the Constitution forms the bedrock of the Court's holdings. *See, e.g.*, *De Lima*, 182 U.S. at 219. The "obvious belief in racial superiority that supported the 'manifest destiny' policies" had ingratiated itself into the case law

that would govern the relationship between the United States and those living in its island territories until the present day. Torruella, *supra*, at 64; *see, e.g.*, *Downes*, 182 U.S. at 300 (U.S. entitled to acquire "unknown island[s], peopled with an uncivilized race, yet rich in soil, and valuable to the United States for commercial and strategic reasons"); *Dorr*, 195 U.S. at 147 ("local community" in the Philippines has never had the right to govern itself "without the guidance and restraint of a superior authority"); *Fourteen Diamond Rings*, 183 U.S. at 179 (Philippines was "under the complete and absolute sovereignty and dominion of the United States").

C. The Government relies on the *Insular Cases* and their progeny in this case.

The Government has tried to sweep the *Insular Cases* under the rug throughout this litigation, but it could not avoid relying on one of their progeny in its petition for certiorari for the central proposition that "[t]he Court has . . . reaffirmed time and again that 'th[e equal protection] guaranty does not require territorial uniformity.'" Pet. 10 (citing *Ocampo*, 234 U.S. at 98). This is no mere detail; whether the "locality" a U.S. citizen happens to occupy should entitle them to a lesser quantum of rights and privileges (such as federal benefits like SSI) is at the heart of this case. Just because the Government has avoided mentioning the *Insular Cases* by name does not mean they have no role to play.

The Government's arguments for reversal start from the false premise that this Court's decisions in *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam), and *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam), "establish that Congress's decision not to extend the SSI program to Puerto Rico complies with the equal-

protection component of the Due Process Clause." Gov. Br. 12. And *Torres* and *Rosario* in turn rely on the *Insular Cases* for their rationales.

In *Torres*, the Court cited *Balzac*, *Dorr*, and *Downes* for the proposition that "Congress has the power to treat Puerto Rico differently, and [] every federal program does not have to be extended to it"—a central assumption underlying its erroneous conclusion that "a law providing for governmental payments of monetary benefits" that excludes Puerto Rico from the program did not violate the constitutional right to travel. 435 U.S. at 3 n.4, 6. And two years later in *Rosario*, the Court summarily extended *Torres*, again reasoning that, because the Territorial Clause empowered Congress to "treat Puerto Rico differently from States," giving Puerto Ricans less assistance under a federal program providing aid to underprivileged families with children did not violate the Equal Protection Clause. 446 U.S. at 651–52. This time, Justice Marshall dissented, calling out the majority's reliance on the *Insular Cases* and their "suggest[ion] that various protections of the Constitution do not apply to Puerto Rico." *Id.* at 653 (Marshall, J., dissenting) (citing *Downes* and *Balzac*). He also pointed out that "the present validity of those decisions is questionable." *Id.*

II. This Court should affirm the decision below by overruling the *Insular Cases* and applying heightened scrutiny.

The time has finally come for the Court to reexamine the *Insular Cases* and the roots of the incorporation doctrine. Decisions that make geographical distinctions that limit individual rights for racist reasons that would be unthinkable today, like *Downes* and *Balzac*, must be overruled. And cases that rely on

them, like *Torres* and *Rosario*, cannot stand either. Because *Torres* and *Rosario* rest on woefully outmoded decisions and cursory per curiam opinions, respectively, stare decisis need not stand in the Court's way.

A. The Court can and should revisit the *Insular Cases*.

The *Insular Cases* have been "much[ ]criticized" since they were decided. *See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020). For well over a century, judges, lawyers, professors, and commentators have expressed a variety of misgivings about them—including Justice Breyer, who has referred to them as a "dark cloud." Transcript of Oral Argument at 82:14, *Aurelius* (No. 18-1334); *see, e.g.*, José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 440 (1978) ("The doctrine of territorial incorporation developed by the Court in the *Insular Cases* and the cases following was based on . . . an apprehension that the peoples of the new insular territories were aliens and a belief that the United States ought not to try to deal with them as though they were Americans."); Littlefield, *supra*, at 170 ("The *Insular Cases*, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views expressed by the different members of the court, are, I believe, without a parallel in our judicial history."); Mack, *Strange Case*, *supra* (*Insular Cases* "are built on the same racist worldview" as *Plessy*); Torruella, *supra*, at 58 ("The strong undercurrents of racial bias that permeated U.S. society at the turn of the century undoubtedly influenced the establishment of this colonial relationship and its approval by the Supreme Court in the *Insular Cases*.").

Indeed, the *Insular Cases* are among the most notorious of this Court's decisions that are still on the books, their overt racial bias earning comparisons to cases like *Korematsu v. United States*, 323 U.S. 214, 297 (1944). Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future for the* Insular Cases*?*, 130 YALE L.J.F. 284 (2020). But unlike *Korematsu*—in which wartime justifications for Japanese internment have mercifully been relegated to that limited context (*see Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018))—the *Insular Cases* are still regularly cited. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 757–59 (2008) (citing *Balzac*); *Powers v. Ohio*, 499 U.S. 400, 406–07 (1991); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268–69 (1990) (same).

The Court should revisit the *Insular Cases* and pare back the territorial incorporation doctrine, which was premised on the outmoded and offensive assumption that residents of unincorporated territories are not equipped to participate fully in their own political and legal system, devaluing their U.S. citizenship and elevating Congressional prerogative over their constitutional rights. To the extent that incorporation permits Congress to deprive U.S. citizens of their constitutional rights based on where they live, it must be discarded. "Territorial status should not be wielded as a talismanic opt out of . . . constitutional constraints." *Aurelius*, 140 S. Ct. at 1671 (Sotomayor, J., dissenting).

Stare decisis does not obligate this court to retain the *Insular Cases*—or, by extension, *Torres* and *Rosario*. *See Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (stare decisis is not "an inexorable command"). "The doctrine is 'at its weakest'" in constitutional cases, because "a mistaken judicial interpretation of

that supreme law is often 'practically impossible' to correct through other means." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997), and *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

This Court is at liberty to revisit the *Insular Cases*, and it should do so now. The three factors Justice Kavanaugh identified in his *Ramos* concurrence as offering "'special justification' or 'strong grounds' to overrule a prior constitutional decision" are all present here. *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part).

First, the *Insular Cases*—with their rationales steeped in racial bias—are "not just wrong, but grievously or egregiously wrong." *Id.* at 1415–16 (citing *Korematsu* and *Plessy*). "An important factor in determining whether a precedent should be overruled is the quality of its reasoning" (*Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479 (2018)), and the *Insular Cases* are so deeply fractured that it is frequently difficult to tell what the controlling rationale even *is*. *See* Torruella, *supra*, at 68 (all of the *Insular Cases* but the last, *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901), were decided by 5–4 pluralities). The decisional process was reportedly fraught, generating "stronger feelings among the justices . . . than any case since [*Dred Scott*]." Cabranes, *supra*, at 436. No agreement could be reached, and "[t]echnically speaking, there is no opinion of the court to sustain the judgment." Littlefield, *supra*, at 171. Contemporary scholars realized early on that the Court's deep divisions "diminishe[d] [the decisions'] authority" (Rowe, *supra*, at 38), and that "[u]ntil some reasonable consistency and unanimity of opinion is reached by the court upon these

questions, we can hardly expect their conclusions to be final and beyond revision." Littlefield, *supra*, at 170.

Indeed, "consistency and unanimity" have *still* not been achieved. The *Insular Cases* cannot be squared with this Court's other precedent, at the time of the decisions—the incorporation doctrine introduced in the *Insular Cases* deviated from the Court's treatment of the Territories in *Loughborough* and *Dred Scott*, "practically overrul[ing them] by a disagreeing majority of one" (*id.* at 177)—or subsequently. *See, e.g.*, *Boumediene*, 553 U.S. at 727 ("The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."); *Rassmussen*, 197 U.S. at 522 (incorporation took place when residents were made citizens); *Mankichi*, 190 U.S. at 210–11 (same); *Dred Scott*, 60 U.S. at 446 (Congress has no constitutional power "to establish or maintain colonies" or "enlarge its territorial limits in any way, except by admission of new States"); *Loughborough*, 18 U.S. at 319 (territories are no "less within the United States" for constitutional purposes than are States).

Second, the *Insular Cases* have caused "significant negative jurisprudential or real-world consequences"—both are on full display in this case. *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring). Granting the residents of unincorporated territories citizenship "suggested equality of rights and privileges and full membership in the American political community," but actually "create[ed] . . . a second-class citizenship for a community of persons that was given no expectation of equality" in a real, meaningful sense. Cabranes, *supra*, at 397–98. "The cases that allow this

anachronistic system of governance to stand . . . should be soundly rejected by the same institution whose decisions have allowed this regime to exist for one hundred and [twenty] years." Torruella, *supra*, at 59.

Third, abandoning the *Insular Cases*' approach to the rights and privileges of citizenship "would not unduly upset reliance interests." *Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring). Given that the precedential value of the *Insular Cases* was in doubt from the very beginning, was deemed "questionable" by Justice Marshall in the 1980s, has been questioned repeatedly by more than a hundred years of legal scholarship, and has been attacked in recent cases, reliance on the *Insular Cases* cannot be said to be "reasonabl[e]." *See id.* at 1415; *see, e.g.*, *Aurelius*, 140 S. Ct. at 1665 (declining to "overrule the much-criticized 'Insular Cases'" because they "did not reach [the Appointments Clause] issue" presented); *Rosario*, 446 U.S. at 653 (Marshall, J., dissenting); Littlefield, *supra*, at 178 (sarcastically lauding the "extraordinary ingenuity manifested in [*Downes*] by the earnest effort to escape" binding precedent).

B. Irrespective of the *Insular Cases*, *Torres* and *Rosario* must be overruled and discrimination against Territorial residents subjected to heightened scrutiny.

If the Court overrules the *Insular Cases* to the extent that they permit geographical limitations on the individual rights of U.S. citizens, it must also overrule *Torres* and *Rosario*, which extended the *Insular Cases*' formulation of second-class citizenship to the Court's equal protection jurisprudence. But even if the Court

chooses not to overrule the *Insular Cases* even in part, it should still revisit *Torres* and *Rosario*.

The Government reads those cases "together" to "establish that Congress's decision not to extend the SSI program to Puerto Rico satisfies" a "rational-basis review." Gov. Br. 13. But the rational-basis framework should not apply here, as territorial residents are properly considered a suspect class, and federal benefits laws that discriminate against them should receive heightened scrutiny.

Respondent argues that heightened scrutiny is warranted based on race, national origin, and a "history of purposeful unequal treatment." Resp. Br. 25–26. The USVI agrees—the link between the demographics of the unincorporated territories (the population of the USVI is 76% Black), the racial bias that has pervaded the entire history of the territories' relationship to the United States, and their second-class status for purposes of federal benefits is undeniable. *See* U.S. Census Bureau, American FactFinder, *2010 U.S. Virgin Islands Demographic Profile Data*, https://archive.ph/20200214060850/https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DPVI_VIDP1&prodType=table#selection-273.0-273.49 (last visited Aug. 19, 2021).

But there is another reason why territorial residents are a "discrete and insular minority" and a suspect class: political powerlessness. *See* Adriel I. Cepeda Derieux, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 826–34 (2010).

Discrimination "against discrete and insular minorities may be a special condition, which tends

seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (citations omitted). When "prejudice [] manifest[s] itself in the treatment of some groups," the Equal Protection Clause demands a hard look at "[l]egislation [that by] imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment." *Plyler v. Doe*, 457 U.S. 202, 218 n.14 (1982).

American citizens living in Puerto Rico and the USVI are victims of a "system of [] discrimination" with the "traditional indicia of suspectness," as the class has been "subjected to [] a history of purposeful unequal treatment" and "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

Contrary to the Government's suggestion, the "proper mechanism" for addressing the discrimination against this class of citizens is not reviewing Congress's discriminatory decisions under the rational-basis standard, and then waiting on "action by Congress" to "effectuat[e] [] change." Gov. 40.

"[T]he fact of powerlessness is crucial, for in combination with prejudice it is the minority group's inability to assert its political interests that curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities. *Cf. Toll v. Moreno,* 458 U.S. 1, 23 (1982) (Blackmun, J., concurring) (citations omitted) (cleaned up). "The very powerlessness of a discrete minority, then, is itself the

factor that overcomes the usual presumption that even improvident decisions [affecting minorities] will eventually be rectified by the democratic process." *Id.*

Torres and *Rosario* did not account for territorial residents' political powerlessness (or any other factor making them "discrete and insular")—indeed, they barely conducted any equal protection analysis at all. Stare decisis need not prevent the Court from course-correcting here, because the "most important" "factors that should be taken into account in deciding whether to overrule a past decision"—"the quality of [the past decision]'s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision"—all favor abandoning *Torres* and *Rosario*. *Janus*, 138 S. Ct. at 2478–79.

First, the "quality of reasoning in *Rosario* and *Torres* was poor—indeed, those summary decisions (without briefing or argument) contained hardly any reasoning at all. "No authority [wa]s cited for th[e] proposition" that Congress may treat Puerto Rico differently from States so long as there is a rational basis for its actions. *See Rosario*, 446 U.S. at 653 (Marshall, J., dissenting) (the Court's "prior decisions do not support such a broad statement"). *Id. Rosario* relied exclusively on *Torres*, which raised no equal protection question. And "[h]eightened scrutiny under the equal protection component of the Fifth Amendment" was never even discussed, though "[s]uch a proposition surely warrant[ed] the full attention of this Court before it is made part of our constitutional jurisprudence." *Id.* at 654. *Rosario* "went wrong at the start when it concluded" that Congress may treat Puerto Rico differently from States so long as there is a

rational basis for its actions, as this Court's precedents said "no such thing." *Janus*, 138 S. Ct. at 2479.

Second, the workability (or not) of *Rosario* and *Torres* weighs against keeping them. The status quo is *un*workable, effectively leaving Americans who reside in Puerto Rico and the USVI with no recourse. Congress is the very body that is responsible for discriminating against the American citizens in Puerto Rico in the first place. Surely, it makes no sense to interpret the Constitution as leaving this question to Congress, when Congress is the very body that relegated this class of citizens to a position of political powerlessness to begin with. "This position poses great risk to the [Fifth] Amendment, in that it amounts to letting the fox stand watch over the henhouse." *Cf. Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 644 n.9 (1996).

Third, the only consistency that *Rosario* and *Torres* have with other decisions is their consistency with the *Insular Cases*, which themselves should be overruled for the reasons stated above. *Rosario* cited "[n]o [other] authority . . . for th[e] proposition" that Congress may treat residents of a territory differently from residents of States so long as there is a rational basis for its actions. *See* 446 U.S. at 653 (Marshall, J., dissenting). There still is none. And summary dispositions like *Rosario* and *Torres* "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

Fourth, the developments since *Rosario* and *Torres* have only "eroded" the decision's "underpinnings" and left it an outlier among this Court's other equal protection cases. *Cf. Janus*, 138 S. Ct. at 2482 (citation omitted). This Court has observed that "over

time the ties between the United States and any of its unincorporated Territories [can] strengthen in ways that are of constitutional significance." *Boumediene*, 128 S. Ct. at 2255. That has surely been the case. For example, the Government has abandoned its claim that granting "greater [SSI] benefits [to Puerto Rico residents] could disrupt the economy." Pet. App. 16a (quotation omitted). Indeed, Puerto Ricans have demonstrated that "not only [do they] make substantial contributions to the federal treasury, [they] in fact have consistently made them in higher amounts than taxpayers in at least six states." Pet. App. 21a. In recent years, the Territories have contributed more than Vermont, Alaska, Wyoming, North Dakota, South Dakota, and Montana. Pet. App. 22a (citing Internal Revenue Serv., *SOI Tax Stats—Gross Collections, by Type of Tax and State—IRS Data Book Table 5*, https://www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5. From 2018 to 2019, Virgin Islanders alone paid $300 million in federal taxes. SHADOW CITIZENS at 11. On these facts, as the First Circuit held below, "the Fifth Amendment does not permit the arbitrary treatment of individuals who would otherwise qualify for SSI but for their residency in Puerto Rico." Pet. App. 33a (citing *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972), and *Carolene Products*, 304 U.S. at 152 n.4).

Fifth, and finally, there are no legitimate reliance interests in keeping *Rosario* and *Torres*. The Government's argument about "calling into question laws that treat Territories more favorably than the States" (Gov. Br. 38) is a red herring, because the laws the Government references do not treat a *suspect class* differently—naturally, those laws would be subject to a rational-basis test. Even if some laws were to be called into question, which is debatable, this Court has

overruled precedent even where "[m]ore than 20 States ha[d] statutory schemes built on [it]" and "[t]hose laws underpin[ned] thousands of ongoing contracts involving millions of employees." *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting). If the laws the Government references discriminate against suspect classes, then those laws should be struck down under the Equal Protection Clause. And the Government's argument that "[m]any courts of appeals have relied" on *Rosario and Torres* is unhelpful, because those Courts felt compelled to do so despite their misgivings to the contrary. *See, e.g.*, *Lopez v. Aran*, 844 F.2d 898, 913 (1st Cir. 1988) (Torruella, J., concurring in part and dissenting in part).

The Government effectively puts the possibility of overruling *Rosario* and *Torres* into play because its argument against stare decisis is that those cases were "decided against the backdrop of and reflect Congress's long-standing practice of enacting different laws for Puerto Rico and other Territories." Gov. Br. 37. But the Government's discrimination against a subset of American citizens can hardly be considered the type of "legitimate" reliance interest necessary to justify adhering to undesirable precedent. *See, e.g.*, *Payne*, 501 U.S. at 828; *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part) (reliance inquiry "focuses on the legitimate expectations of those who have reasonably relied on the precedent").

Any reliance interests there might be in *Torres* and *Rosario* must give way because stare decisis is "at its weakest" when this Court interprets the Constitution. *See Knick v. Township of Scott*, 139 S. Ct. 2162, 2177 (2019); *Janus*, 138 S. Ct. at 2478. Stare decisis's "greatest purpose is to serve a constitutional ideal—the rule of law." *Citizens United v. FEC*, 558 U.S. 310,

378 (2010) (Roberts, C.J., concurring). Adhering to *Torres* and *Rosario*, which are rooted in the discrimination of the *Insular Cases*, "does more to damage this constitutional ideal than to advance it." *Id.*

Within the United States, the rights and incidents of citizenship are not parceled out geographically. "[D]ivvying up" American citizens by where they decide to live in the United States and its Territories "is a sordid business." *Cf. League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part). "Our nation gave its word over and over again: it promised in every document of more than two centuries of history that all persons shall be treated Equally." *Price v. Civil Serv. Comm'n*, 604 P.2d 1365, 1390 (Cal. 1980) (Mosk, J., dissenting). This Court should keep that promise.

Congress's exclusion of U.S. citizens in Puerto Rico from receiving SSI benefits violated the equal protection component of the Fifth Amendment. The same is true for American citizens in the USVI.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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